CITATIONS

Cases:

	Page
American Trucking v. *Atchison, T. & S.F. R. Co.*, 387 U.S. 397	10
Blankenship v. *Western Union Tel. Co.*, 161 F. 2d 168	6
First-Citizens Bank & Trust Co. v. *Camp*, 409 F. 2d 1086	8
Helvering v. *Morgan's, Inc.*, 293 U.S. 121	6
Minnesota v. *Probate Court*, 309 U.S. 270	6
National Association of Securities Dealers v. *Securities and Exchange Commission*, C.A.D.C. Nos. 20164 *et al.*, decided July 1, 1969	8
Schauf v. *City of New York*, 23 Misc. 2d 585, 198 N.Y.S. 2d 435	6
State Chartered Banks in Washington v. *Peoples National Bank of Washington*, 291 F. Supp. 180	4
Surowitz v. *City of Pontiac*, 374 Mich. 597, 132 N.W. 2d 628	6
United States v. *Southwestern Cable Co.*, 392 U.S. 157	10

Statutes:

12 U.S.C. 24 Seventh	4, 5
12 U.S.C. 36(c)	2, 4, 7
12 U.S.C. 36(f)	4, 5, 6, 7, 8, 10
Florida Stat. Ann., Section 659.52(1)(a)	9

Miscellaneous:

Comptroller's Manual for National Banks	10, 11, 12
National Banks and the Future, Report of the Advisory Committee on Banking to the Comptroller of the Currency (1962)	12

364-896—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 19

THE FIRST NATIONAL BANK IN PLANT CITY, PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE COMPTROLLER OF THE CURRENCY

Because our opponents[1] disagree both as to what the issues in this case are and as to the resolution of what we deem the fundamental issue, a brief reply

[1] The respondents (the Florida Commissioner and three state banks that compete with the petitioner national bank) and the amicus curiae National Association of State Bank Supervisors have elaborated in detail their differing arguments in favor of

may help to restore the case to its proper focus. In addition, we shall correct certain errors in the opposing briefs and answer some points with which we did not deal specifically in our opening brief. We do not, of course, present here our answers to each of the contentions that the various opposing briefs have mustered in response to our opening brief.

1. In an effort to avoid the fundamental issue raised by the decision below, the respondents accept our position that federal law provides the definition of "branch" for purposes of Section 36(c) (Br. pp. 41, 44) and rest their case upon the proposition that the activities of the petitioner bank amount to branching as a matter of federal law. Significant as it is, this concession—which is in direct opposition to the position of the *amicus* National Association of State Bank Supervisors (NASSB)—does not remove the choice of law issue from the case. Acceptance of the concession would, we believe, facilitate a ready disposition of the case in the petitioners' favor, but it would leave unexamined the fundamental proposition for which the decision below stands both on its face and in the eyes of other courts and the state banking commissioners.[2] That proposition—that state law governs the very threshold determination whether par-

affirming the result below. The other *amici curiae* favoring affirmance (Independent Bankers Association, *et al.*; The First National Bank of Gainesville, *et al.*; and the States of Georgia and North Carolina) take positions that are in substance the same as those taken in the brief for the respondents. This reply brief refers directly only to the brief for the respondents and to that for the state bank supervisors.

[2] NASSB Br. p. 11; see generally Brief for First National Bank of Cornelia, *et al.* as *amici curiae*.

ticular national bank activities are subject to state limitations—is erroneous and dangerous for the dual banking system established by Congress and this Court should pass upon it.

The respondents' approach to the case involves a distortion of the court of appeals' decision, accompanied by misquotations and quotations out of context. In order to show this, it is enough to quote the court's own express statements of the issue and of its holding:

> The controlling issue of law in this appeal concerns the district court's choice of law, i.e., that court's failure to consult state law in determining whether First National's activities outside its main offices constitute "branch banking. * * *" [A. 396–397]
>
> * * * * *
>
> * * * First National attempts to convince us that Section 36(f) of the National Banking Act is * * * the sole and monolithic definer of "branch." Then, by taking us through some labyrinthian and meandering paths of the laws of agency and contract, First National seeks to demonstrate that it has not established offices or agencies, where, as specified in Section 36(f), "deposits are received, or checks paid, or money lent." Such a line of argument * * * is indefensible. [A. 400]
>
> * * * * *
>
> * * * We therefore refuse to tread the twisting paths of agency and contracts urged upon us in this case and look instead to the laws of Florida. [A. 408]

The fact that the court stated that it "subscribed" to a somewhat confusing district court opinion in

another case[3] obviously cannot detract from its own statement of what it was deciding. And the respondents' claim that the decision below is based upon a "finding that the off-premises banking activities met the federal test of branching" is disproved by the complete absence from the opinion of any discussion of the facts of the case in terms of the language of the federal definition set forth in Section 36(f).

For the reasons we have stated in our opening brief, we urge this Court to endorse the district court's treatment of the threshold question of definition as a question solely of federal law. Since the district court then concluded that the bank activities in question were not branching under Section 36(f), it properly found Section 36(c), and therefore Florida law, wholly irrelevant to their legality. Although the court of appeals did not have occasion to review this application of the federal standard, we have, however, suggested that it would be appropriate for this Court to do so and to terminate the litigation by reinstating the district court's judgment in favor of the national bank and the Comptroller.[4]

---

[3] *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash.), quoted in part in the court of appeals' opinion at A. 401–406. We discuss Judge Lindberg's opinion at some length in our opening brief at pp. 6–8.

[4] We disagree with the respondents' contention at pages 50–52 of their brief that the Court would in any event have to remand the cause for a determination whether the activities in question lie within a national bank's incidental powers under 12 U.S.C. 24 Seventh, and for consideration of evidence relating to the bank's actual compliance with the Comptroller's regulations on messenger service. The district court's final judg-

2. The state banking supervisors understandably disagree with the respondents on the choice of law question, which they view as the "essential question herein" (NASSB Br. p. 10). Their primary concern is of course with the general extent of their power over national banks, and they acknowledge that their aim is to "plac[e] state branch statutes in a position of dominance in the matter of branching" (NASSB Br. p. 11). To this end, they devote their brief largely to advancing an interpretation of Section 36(f) intended to correct the failure of the court below to give any explanation for its presence in the statutory scheme while preserving the conclusion that state notions of what is branching govern. Their rationalizations do not, however, withstand analysis.

The state supervisors seize upon the word "includes" in subsection (f); they argue that since the federal definition says that the term "branch" "*includes*" the enumerated activities rather than that it "*means*" those activities, it must follow that some

---

ment properly held that resolution of any question under Section 24 Seventh was "not appropriate or necessary" (A. 376); the question whether the Comptroller has properly ruled that such messenger service is a permissible exercise of a national bank's incidental powers is wholly unrelated to the issues of this case and no declaration on that subject was sought by the national bank or the Comptroller. And the district court properly concluded that the issues before it were limited to "the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect" (A. 373), thus rendering it unnecessary for the court "to consider every transaction that has taken place since the messenger service was inaugurated * * *" (A. 374).

other activities can also be enough to constitute a branch. Then, with the support of nothing more than the invocation of a putative overriding policy of "competitive equality", they conclude that the determination of what other activities might constitute a branch for purposes of the federal law must be made not as a matter of federal law by the federal regulatory agency or by the federal courts but by state officials and state courts applying state branching policy. They purport to give Section 36(f) a meaning by saying that it is intended simply to eliminate any doubt that the enumerated activities should be treated as branching. (NASSB Br. pp. 28–29.)

This effort to rationalize Section 36(f) out of existence is no more effective than the court of appeals' approach of ignoring it. First, the NASSB's reasoning unjustifiably assumes that use of the word "includes" is inconsistent with a legislative intent to establish an exclusive definition. But this Court has recognized "that the term 'includes' may sometimes be taken as synonymous with 'means'" and that it must be read in the light of the pertinent statutory context and legislative history.[5] Our opening brief shows

[5] *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125. See *Minnesota* v. *Probate Court*, 309 U.S. 270, 273–274; *Surowitz* v. *City of Pontiac*, 374 Mich. 597, 604, 132 N.W. 2d 628, 632; and *Schauf* v. *City of New York*, 23 Misc. 2d 585, 587, 198 N.Y.S. 2d 435, 438. In *Blankenship* v. *Western Union Tel. Co.*, 161 F. 2d 168, 169 (C.A. 4), a case strikingly similar to the instant one, the phrase, "'[e]mployee' includes any individual * * *," as used in a definitional subsection of the Fair Labor Standards Act, 29

(pp. 23–32) that the statutory scheme requires Section 36(f) to be treated as a federal definition and that Congress so intended; the NASSB has pointed to no legislative history indicating a congressional intent that the federal definition be "supplemented" by varying state definitions, and we are aware of none. Second, we have shown (pp. 15–23) that there is no overriding abstract principle of "competitive equality." And, finally, the NASSB's rationalization of subsection (f) would make it a superfluity just as surely as would the court of appeals' blindfold: Defining the enumerated activities as branching is meaningful under subsection (c) only if they also constitute unauthorized branching under the pertinent state substantive law; but if the state so regards them they would, under the NASSB formulation, be branching for purposes of subsection (c)'s reference to state law even without regard to the enumeration.

3. The respondents and the NASSB seriously distort the Comptroller's position as to the meaning and application of the federal definition of "branch" established by Section 36(f). It is not the Comptroller's position, as they contend, that "anything less than an off-premise office conducting a full banking business" is not a branch under the Section 36(f) definition (NASSB Br. p. 31; Respondents' Br. pp. 15–16, 38–39). This distortion is based upon a misapplication of our argument on the choice of law question (where we

---

U.S.C. 203(e), was held by the court to constitute an exclusive definition. The court based this determination upon the conference committee report's statement that, " 'Employee' is *defined* as any *individual* * * *."

show that Congress intended to establish a federal definition and to make it exclusive) as an argument on the wholly separate question of the meaning of the terms of the definition that Congress in fact enacted.

We do not dispute that Section 36(f) defines "branch" in the disjunctive: An activity is branching if it amounts to the receipts of deposits *or* the payment of checks *or* the lending of money. And we agree that the presence or absence of any of these functions must be determined not on the basis of hypertechnical legal fictions but rather in the light of normal banking usages and the practicalities of the banking business. We recognize, and indeed emphasize, that subsection (f) uses broad and somewhat vague terms that establish only a general framework for determining whether one of these critical "lifeblood functions" of branching is present. But we do contend that the filling in of the gaps in the definition and its application to particular situations are committed in the first instance to the Comptroller of the Currency as administrator of national banks, subject only to judicial review in the federal courts. And, as we have argued in our opening brief (pp. 42–43), the Comptroller's expert interpretation of the Act with whose administration he is charged is entitled to controlling weight unless it is demonstrated to be unreasonable.[6]

[6] See, in addition to the cases cited at p. 43, n. 43 of our opening brief, *First-Citizens Bank & Trust Co.* v. *Camp*, 409 F. 2d 1086, 1093–1095 (C.A. 4); *National Association of Securities Dealers* v. *Securities and Exchange Commission*, C.A.D.C. Nos. 20,164 *et al.*, July 1, 1969, sl. op. pp. 4, 47–48.

Certainly it cannot be contended that every off-premise activity related to the banking business is *ipso facto* branching.[7] The question in every case is inevitably one of the nature and extent of the off-premises activities that are being carried on. The legal relationship that a particular activity establishes between the bank and its customer is certainly a major factor in identifying the banking functions involved; the mutual rights and obligations created by a particular banking act are always, to some extent at least, in the minds of the customer and the bank's agent, especially so where—as with the activities involved in this case—the customers are primarily business enterprises. It was thus entirely proper for the Comptroller to give weight to the legal relationships created by the messenger and receptacle services involved in this case. In the absence of any contrary statutory language or other expression of legislative intent,[8] we submit that the district court was correct in af-

[7] See NASSB Br. pp. 35–36. Thus, for example, the respondent Florida Commissioner by letter of July 28, 1969, advised the Broward National Bank of Ft. Lauderdale, Florida, that "the activity by your bank's personnel in selling for cash bank money orders, cashier's checks, travelers' checks or similar instruments for transmission of money, on board ships docked at Port Everglades, is considered permissible under" Section 659.52(1)(a) of the Florida statutes.

[8] The reply brief for the petitioner national bank demonstrates the error of the respondents' contentions that congressional concern with what were then known as "teller windows" during the debates on the original McFadden Act indicates an intent to restrict the much more limited kind of off-premise activity involved here. The bank's reply brief also discusses in factual detail, as does its opening brief, the practical operation of the pick-up and delivery service in question.

firming, as it did, the Comptroller's interpretation.

4. The respondents disparage the Comptroller's authorization of messenger and receptacle services by characterizing it as "absolutely unique" and "contrary to the long-standing administrative practice" of his predecessors (Br. pp. 25–26). The first answer to this argument is that it is irrelevant; administrative discretion is not frozen by the manner in which it has been exercised in years gone by, but must be flexible to meet changing circumstances, as the court of appeals recognized (A. 407). *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 164–171; *American Trucking* v. *Atchison, T. & S.F. R. Co.*, 387 U.S. 397, 416.

The second answer is that there is nothing unique or unprecedented about the Comptroller's contemporary interpretation of Section 36(f) as expressed in paragraph 7490 of his Manual for National Banks. Indeed, a similar interpretation is found in rulings shortly after the enactment of the McFadden Act. In a March 6, 1929, letter to the Frost National Bank, San Antonio, Texas (a nonbranching state), the Comptroller's office stated (A. 186):

> This office is not disposed to encourage the use of armored cars, or any other agency, for the collection or receipt of deposits which under ordinary circumstances should be received at the banking house of a national bank. *In the opinion of counsel, to whom this question has been referred, however, it will be difficult to sustain a general ruling that the use of an armored car for the purpose of collecting a deposit of a bank's customer is illegal.* A bank,

as an incident of its business, uses its runners or agents to collect notes, drafts and bills of exchange for customers or correspondent banks. By analogy it might be claimed that it has the right to send an agent or employee to collect a deposit which a customer desires to make. The purpose for which the armored car is used must, therefore, be considered in each case in determining its legality.

If a bank should undertake to use an armored car as a place of business for opening accounts, receiving deposits, making loans, and in general for conducting the banking business at some place other than at its home office, as you suggest, it might be held by the courts to have been used as a branch bank in which case its use would clearly be ultra vires.

You are correct in stating that it is customary for banks in some places to be equipped with armored cars * * *. [Emphasis added.] [9]

The next thirty years saw a series of letter rulings, some of which we acknowledge are mutually inconsistent; all of these, however—including those cited by the respondents—recognized that the definition of "branch" was a matter of federal law. Finally, in 1963 after several years of intensive study endeavoring "to transform the regulation of National Banks into a responsive and meaningful instrument of public policy * * *" (Comptroller's Manual for National Banks, p. iii), the first formal rulings on the

[9] The record contains similar letter rulings approving bank messenger services dated March 16, 1929 (A. 185–186), July 11, 1941 (A. 187), and May 14, 1954 (A. 188–189).

subject were issued as paragraphs 7490 and 7491[10] of the Comptroller's Manual for National Banks. Thus, rulings of the Comptroller's office contemporaneous with the McFadden Act, and the only formal rulings made after a well-organized and thorough study of the banking system,[11] take the position that national banks may operate messenger services under appropriate circumstances.

---

[10] Par. 7490 is the ruling directly involved in this case. Par. 7491 is quite similar in theory and provides:

> Deposit machines. A national bank may utilize at any location a machine which receives checks, currency, or coin for deposit. The machine shall provide documentary evidence of the transaction which states that the transaction will become a deposit upon verification and crediting at the main office or a branch office of the bank. Utilization of such machines at locations other than the main office or a branch office of the bank does not constitute branch banking. A bank may provide insurance protection under its bonding program for transactions involving such machines.

[11] For one aspect of this study, see *National Banks and the Future*, Report of the Advisory Committee on Banking to the Comptroller of the Currency (1962).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief and the briefs for the petitioner national bank, the judgment of the court of appeals should be reversed and the cause remanded with directions to affirm the judgment of the district court.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

JAMES VAN R. SPRINGER,
Deputy Solicitor General.

ROBERT V. ZENER,
ROBERT E. KOPP,
Attorneys.

C. WESTBROOK MURPHY,
Office of Comptroller of the Currency.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969